Supreme Court, U.S.
FILED

971526 MAR 9 1998

OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

** CLASS ACTION **

Koichi Matsumoto and Yuki Kobayashi,
individually and on behalf of
all others similarly situated,
Petitioners,
vs.
James R.Gotcher, et al.
Respondents.

On Petition for a Writ of Certiorari to
the Court of Appeal of California,
Second Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

Koichi Matsumoto and
Yuki Kobayashi
c/o Yuki Kobayashi
1469 S. Norton Ave.
Los Angeles, CA90019
Phone:(213)734-4815
Petitioners

October, 1997

QUESTIONS PRESENTED

The questions presented are:

1. Whether California Constitution is unconstitutional because it does not require notice, hearing and a reason for involuntary dismissal of an appeal, which is equivalent to affirmance of the judgment of lower court and thereby results in depriving appellant of life, liberty or property (money) without notice, hearing and a reason infringing the federal rights to due process of law, equal protection of law and access to the courts guaranteed by the Fifth and Fourteenth Amendments to the Unites States Constitution when a disadvantaged minority group of Japanese aliens involving 3,000 victims spread all over the world in a consumer fraud class action were denied appearance of their counsel in trial court, the action was dismissed by a legally disqualified trial judge without an opportunity to try the case on merits, and, upon appeal therefrom, again their appeals were arbitrarily dismissed for unknown reasons without notice, hearing, reasons or an opportunity to argue the merits of the appeals.

2. Whether California statute is unconstitutional because it automatically awards costs on appeal to respondent against appellant without notice, hearing and even a reason in the case of involuntary dismissal of an appeal, and, thus, infringes the federal rights of appellant to notice, hearing and a reason before depriving him of life, liberty or property (money) as guaranteed by the due process of law, equal protection of law and access to the courts under the Fifth and Fourteenth Amendments to the Unites States Constitution.

3. Whether a California state court may, consistent with the due process of law, equal protection of law and access to the courts under the Fifth and Fourteenth Amendments to the Unites States Constitution, grant a motion to dismiss an action as well as an appeal therefrom made by a party designated as "Individual Partners of Coudert Brothers" without identifying individual names.

[Other Respondents]

AKIKO MURATA
YUGO TOMITA
COUDERT BROTHERS
DAVID JACOBS
STEPHEN O. SPINKS
VANDER SCHUEREN
DAVID R. HALPERIN
THOMAS E. JONES
W.GAGE MCAFFEE
OWEN D. NEE
SOO YOUNG YEU
STEVEN R. BEHERRELL
COLIN D. LONG
BARRY METZGER
HUGH E. THOMPSON
RONALD W. BUCKLY
PETER D. CLEARY
DOUGLAS L.HALLETT
VICTORIA E. MARMORSTEIN
RAPLH C. NAVARRO
JHON A. ST. CLAIR
BARRYE L. WALL
RICHARD WALLACE
WENDY L. ADDISS
DOUGLAS R. ADEN
DOEL A. ADLER
STEVEN H. BECKER
THOMAS D. BRISLIN
PETER S. BRITELL
DOUGLAS F. BRODER
JEAN-FRANCOIS CARRERAS
PAMELA T. CHURCH
EDMUND S. COHEN
JEFFREY E. COHEN
JAMES C. COLIHAN
FREDERIC R. COUDERT
CHARIES H. CRITCHLOW
E.A. DOMINIANI
THOMAS J. DRAGO
JONATHAN D. DUBOIS
ROBERT L. ELSEN
JAMES R. ELSZNER
CAROLYN T. ELLIS
JONATHAN JACOBSON
PATRICK B. FENN
ROBERT S. FRANKLIN
ADAM FREMANTLE
PAUL D. FRIEDLAND
KEVIN W. GOERING
MICHAEL J. HAGAN
GERARD V. HANNON
ANDREW S. HEDDEN
S.L. HIGHLEYMAN
ELINOR R. HOFFMAN
STEPHEN HOGAN
ROBERT N. HORNICK
STEPHEN M. HUDSPETH
ANTHONY C. KAHN
ROSS KAUFMAN
FREDERICK P. KONTA
MARK D. LEBOW
DAVID H. MARKS
EDWIN S. MATTHEWS
MCAULIFFE E.TIMOTHY
JOHN N. MACBAINE
TIMOTHY J. MCCARTHY
JOHN E. MACDERMOTT, JR.
BRIAN E. MCGUNIGLE
MARVIN E. MILBAUER
TIMOTHY J. O'BRIEN
PAMELA G. OSTRAGER
KENNETH R. PAGE
KATHERYN C. PATTERSON
DARRELL E. PRESCOTT
WILLIAM RAND
RANKIN CLYDE E. III
REDWAY A. JAMES
RICHARD R. RELLY
SETH A. RIBNER
W. WARREN SCOTT III
NORMAN H. SEIDLER
GEORGE H. SHENK
JAMES B. SITRICK
GORDON B. SPIVECK
W. PRESTON TOLLINGER, JR.
STEPHEN M. VINE
CHARLES H. WAGNER
THOMAS J. WEBER
CHRISTOPHER M. WELLS
ELLEN R. WERTHER
ANTHONY WILLIAMS
JACQUES BUHART
ERIC M. CAFRITZ
WILLIAM LAURENCE CRAIG
JEAN-PATRICE DE LA LAURENCIE
JEAN-FRANCOIS. MERCADIER
H. VAN KIRK REEVES
CHRISTIAN SAIBAING
NICOLAS SOKOLOW
ROBIN TREVOR TALT
JONATHAN M. WOHL
DAVID S. FOSTER
RONALD S. KATZ
LILIAN K. NAKAGAWA
PETER G. PISTT
ANTHONY THEOPHILOS
GEORGE T. YATES, III
NORMAN P. GIVANT
BETSY E. BAYHA
ROBERT A. CHRISTOPHER
DENNIS R. DEBROECK
GLEG L. PICKRELL
JEFFREY LEOW
STUART RUBIN
WILLIAM J. GOUGH
MARK GROLMAN
ROBERT SEIDLER
LANCE J. MILLER
CHARLES R. STEVENS
MILO G. COERPER
RICHARD N. DEAN
MARK R. HERLACH
SHERMAN E. KATZ
ROBERT A. LIPSTEIN
DOUGLAS E. ROSENTHAL

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OTHER RESPONDENTS	ii
TABLE OF AUTHORITIES	iv
1. OPINIONS BELOW	1
2. JURISDICTION	1
3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
4. STATEMENT OF THE CASE	2
5. REASONS FOR GRANTING THE PETITION	5
5.1. This Case Presents Important Unsettled Federal Questions That Should Be Settled By This Supreme Court	5
5.2. The Decisions of the State Court Are Erroneous	8
6. CONCLUSION	8
APPENDICES	1A
A. Order of State Court of Appeal Dismissing Appeal	1A
B. Order of State Supreme Court Denying Review	2A
C. Order of State Court of Appeal Dismissing Appeal	3A
D. Remittitur Notice	4A

TABLE OF AUTHORITIES

CASES Page

Agnew v Superior Court
118 Cal.App.2d 230, 234 (1953) 7
People v Brown
149 Cal.App.2d 175, 176 (1957) .. 1,5,6
Griffin v Illinois
351 U.S. 12 (1955) 6
People v Lawrence
140 Cal.App.2d 133 (1956),
295 P2d 4 5
Railroad Tax Cases
13 F 722 (D.Cal. 1882) 5
People v Rojas
118 Cal.App.3d 278, 288 (1981) 6
Siegel v Levy Organization Dev. Co.,
607 N.E.2d 194 (Ill 1992) 7
State ex rel. J. Hahn Bakery Co v Anderson
269 Mo 381, 190 SW 857 (1916) 7
Washington ex rel. Oregon R.& N. Co. v Fairchild 224 US 510 (1911) 7

STATUTES, RULES, and CONSTITUTION

28 U.S.C. Sec.1257 (a) 1
28 U.S.C. Sec.2403 (b) 1
Code of Civil Procedure
Sec.902 3
California Rules of Court
Rule 26 1,5,6
California Constitution 1,5,6,7
Unites States Constitution 5,6,7

Petitioners Koichi Matsumoto and Yuki Kobayashi, jointly, respectfully petition for a writ of certiorari to review two orders of dismissal of three appeals and automatic award of costs on appeal without notice and hearing made by the Court of Appeal of California, Second Appellate District, Division One in this case.

28 U.S.C. Sec.2403 (b) may apply.

1. OPINIONS BELOW

The Court of Appeal of California, Second Appellate District, Division One, issued no opinion in dismissing three appeals of petitioners and automatically awarding costs on appeal against them [App., *infra*, 4A]. Nor the Supreme Court of California issued an opinion in summarily denying petition for review [App., *infra*, 2A].

2. JURISDICTION

The orders of dismissal of three appeals were entered on 9-16-97 and 12-18-97 [App., *infra*, 1A,3A] by the Court of Appeal of California, Second Appellate District, Division One. All appeals arose from the same underlying action between the same parties and involve substantially the same issues. On 12-10-97, the Supreme Court of California denied a petition for a discretionary review of the first dismissal of appeal [App., *infra*, 2A]. That court has not yet acted the petition for a discretionary review of the second dismissal of appeal, but the petition will be deemed denied by operation of law if the court fails to act by 3-27-98. The jurisdiction of this court is invoked under 28 U.S.C. Sec.1257 (a).

3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Constitution Article 6, Secs.3 and 14 require oral argument, concurrence of two judges, and written reasons in a decision on appeal, but not in an involuntary dismissal of appeal [*People v Brown* 149 Cal.App.2d 175, 176 (1957)].

California statute, Rule 26 (a) of California Rules of Court, automatically awards costs on appeal to respondent against appellant without notice, hearing or

even a reason in the case of involuntary dismissal of an appeal.

4. STATEMENT OF THE CASE

The underlying lawsuit is an unprecedented, historic consumer fraud class action brought by a disadvantaged minority group of Japanese aliens involving estimated 3,000 victims spread all over the world and at least 2 million dollars actual damages against a large international law firm and its 125 partners and employees.

Taking advantage of the weakness of aliens, defendants-respondents deceived and defrauded these aliens, including petitioners, by advertising "99% success in getting green cards" in a green card lottery program with misrepresentation of and without full disclosure of material facts. When the green card lottery ended, virtually almost no one obtained a green card. By so defrauding aliens, respondents collected 2 million dollars or more from the aliens, and refused to refund any penny. These victims sought redress and justice according to the law of the United States in state trial court.

Employing the same tactics of deception with misrepresentation of and without full disclosure of material facts and law, respondents committed fraud upon trial court and successfully obtained a judgement of dismissal. One example was that respondents intentionally avoided service of process. For such purpose, respondents suppressed disclosure of individual names of partners, and appeared in trial court calling themselves as "Individual Partners of Coudert Brothers." In addition, respondents claimed that petitioner Yuki Kobayashi was a party to the action, and, so claiming, successfully obtained an order quashing the service of process made by Yuki Kobayashi. On appeal, respondents argued that Yuki Kobayashi was not and has never been a party to the action and thus could not be a proper appellant. By so arguing, respondents again successfully obtained dismissal of appeal.

Furthermore, the trial judge repeatedly denied appearance of petitioners' attorneys and, even after

having been legally disqualified, refused to recuse himself and granted motions to dismiss the action brought by "Individual Partners of Coudert Brothers" without identifying individual names. Thus, petitioners were deprived of the opportunity to try the case on merits.

Petitioners filed three appeals in the state Court of Appeal, each appealing a different judgment of dismissal.

In the Court of appeal, respondents continued to employ the same tactics of deception as in trial court by intentionally misrepresenting material facts and law.

Respondents, again calling themselves as "the Individual Partners of Coudert Brothers" without identifying individual names, moved to dismiss the appeal fraudulently claiming that appellant Yuki Kobayashi had no standing to appeal since he was not a party to the action below. The motion was properly denied.

In any event, appellant Kobayashi is and was an unnamed class member and unnamed plaintiff of this class action in trial court. Also, he was aggrieved at trial court's adverse judgments of dismissal, and moved trial court to set aside such adverse judgments. Appellant Kobayashi appealed such trial court's adverse judgments as an aggrieved party under Sec.902 of the Code of Civil Procedure, individually and on behalf of all others similarly situated. In addition, appellant Kobayashi is and was an agent and attorney-in-fact of co-plaintiff-appellant-petitioner Koichi Matsumoto in prosecuting the class action on his behalf, who is and was a named class member and named plaintiff in trial court.

After the unsuccessful motion to dismiss appeal, respondents again moved to dismiss the appeal arguing that this time somehow petitioners had failed to comply with the order of the Court of Appeal, failed to timely acquire record on appeal, had no standing to appeal, and so on. The fact of the matter was that the delay in preparing record was caused by the trial court not by petitioners. Petitioners were not in default and timely complied with the court order, which required them to re-designate the record on appeal and perfect the designation within ten days.

Meanwhile, the record was completed and the issue of

re-designation became moot. However, the respondents' tactics worked. Court of appeal arbitrarily dismissed the first appeal, and then the second and third appeals, without providing oral hearing, concurrence of two judges or a written statement of reasons. Thus, the reason for the involuntary dismissal was totally unknown and uncertain.

Again, petitioners were deprived of an opportunity to argue the merits of the appeals.

The Court of Appeal was the California state court of last resort in the civil appeal.

On 10-27-97 and 1-27-98 petitioners petitioned the Supreme Court of California for review of the two orders of dismissal of the three appeals raising the following federal questions:

1. California's procedures for involuntary dismissal of appeal do not pass constitutional muster [First Petition P.10; Second Petition P.9].

2. The court of appeal did not conduct meaningful and adequate review of the court record in dismissing appeal [First Petition P.11; Second Petition P.11].

3. The court of appeal was without jurisdiction to grant the motion to dismiss appeal brought by unidentified respondents "the individual partners of coudert brothers" [Second Petition P.9].

On 12-10-97 the state Supreme Court summarily denied a discretionary review of the first petition without hearing nor opinion.

On 1-13-98 a remittitur including automatic award of costs on appeal against petitioners was issued even though no award of costs had been noticed or heard by the court of appeal.

The second petition for discretionary review is still pending in the state Supreme Court. It will be deemed denied by operation of law if not acted on by 3-27-98.

The constitutionality of state statute Rule 26 is pending in the state Court of Appeal. The issue has not yet brought to the state Supreme Court. However, because the issue is closely related to and similar to the constitutionality of the state constitution involving the same parties and circumstances, it should be considered

together in this petition for judicial economy.

The federal questions sought to be reviewed by this Court relate to appellate proceedings in the state court of appeal as well as proceedings in the trial court, and were born when the state courts dismissed the action and three appeals without affording petitioners "a day in court." There was no other method of bringing the questions to the attention of the state courts.

5. REASONS FOR GRANTING THE PETITION

"A day in court" is a fundamental right under the Unites States Constitution. When such right is violated by both state trial court and state Court of Appeal despite petitioners' diligent and good faith efforts, it is necessary to settle this important question of law by this court.

This case involves very important public policy questions and other matters significantly affecting the administration of justice not only to the disadvantaged minority group of Japanese aliens involving 3,000 victims but also all other appellants in California and other states.

5.1. This Case Presents Important Unsettled Federal Questions That Should Be Settled By This Supreme Court

It has well been established that any state statute or constitution which may deprive a person of life, liberty or property without providing or requiring notice and oral hearing is unconstitutional [*Railroad Tax Cases* 13 F 722, 752-753 (D.California 1882); *People v Lawrence* 140 Cal.App.2d 133, 136-137 (1956), 295 P2d 4].

Both the California Constitution and statute in question do not require such notice and hearing while depriving appellant of life, liberty or property (money) in the case of dismissal of appeal [*People v Brown* 149 Cal.App.2d 175, 176 (1957)]. Therefore, they are unconstitutional and invalid.

The California constitutional provision requiring written opinions in deciding an appeal is designed to insure that the reviewing court gives careful thought and

consideration to the case and that the statement of reasons indicate that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected [*People v Rojas* 118 Cal.App.3d 278, 288 (1981)]. However, this constitutional provision is said to not apply in dismissing an appeal [*People v Brown* 149 Cal.App.2d 175, 176 (1957)]. Therefore, under the California Constitution, the state court of appeal does not need to provide oral argument, concurrence of two judges, and written reasons in dismissing an appeal.

When a state court of appeal involuntarily dismisses an appeal, the effect is affirmance of the judgment of lower court, which results in depriving appellant of life, liberty or property (money) without notice, hearing and a reason infringing the federal rights to due process of law, equal protection of law and access to the courts guaranteed by the Fifth and Fourteenth Amendments to the Unites States Constitution.

Furthermore, the California statute automatically awards costs on appeal to respondent against appellant without notice and hearing in the case of involuntary dismissal of an appeal. Since the California Constitution does not require oral argument, concurrence of two judges, and written reasons in dismissing an appeal as discussed above, the real effect of the statute is to deprive an appellant of life, liberty or property (money) without notice and hearing. In depriving appellant of life, liberty or property (money), the court does not give or is not required to give any reason for it. These effects constitute clear violations of the due process of law, equal protection of law and access to the courts guaranteed by the Fifth and Fourteenth Amendments to the Unites States Constitution.

Moreover, this Court has determined that state court's denial of the one and only appeal of petitioner as of right was a violation of the due process right guaranteed by the Fourteenth Amendment [*Griffin v Illinois* 351 U.S. 12, 18 (1955)].

Similarly, a California court of appeal has determined that one who takes a timely appeal is entitled to perfect it, and a suppression of the exercise of that right amounts

to a denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the federal constitution [*Agnew v Superior Court* 118 Cal.App.2d 230, 234 (1953)].

And, the Supreme Court of Missouri states that a party otherwise entitled to appeal who, by the construction of a statute, is prevented from doing so, where such right is given to all others in similar cases, is thus deprived of the right of due process of law [*State ex rel. J. Hahn Bakery Co v Anderson* 269 Mo 381, 190 SW 857, 858 (1916)].

This Court further determined that Due Process of Law protects against arbitrary action; Consequently, arbitrary action by the tribunal in the hearing of a cause or in its order violates due process [*Washington ex rel. Oregon R. & N. Co. v Fairchild* 224 US 510, 523 (1911)].

Furthermore, the Supreme Court of Illinois states that in order to develop and maintain a coherent body of law, it is imperative that reviewing courts set forth their rationale and discuss the relevant case law pertaining to the issues in a given case [*Siegel v Levy Organization Dev. Co.*, 607 N.E.2d 194, 199 (Ill 1992)].

In California, appeal from a judgment of a superior court to a court of appeal is as of right and is given to all. However, petitioners' appeals were arbitrarily dismissed by Court of Appeal for unknown reasons. If the California Constitution had required oral argument, concurrence of two judges, and written reasons as in any other decisions on appeal, such arbitrary dismissal could have been prevented and petitioners' right to appeal would not have been violated.

Another basic federal question presented is whether "Individual Partners of Coudert Brothers" without identifying individual names is a proper party to appear and move for dismissal of action or appeal, consistent with the due process of law, equal protection of law and access to the courts under the Fifth and Fourteenth Amendments to the Unites States Constitution. The complaint did not name "Individual Partners of Coudert Brothers" as a party to the action. Clearly, such designation was uncertain and insufficient enough to determine whether it meant the current partners or the

past partners, or which partners appeared and which partners did not appear.

These issues are extremely important affecting citizens of California as well as other states because every appeal is subject to arbitrary dismissal, and, when dismissed, appellant is automatically sanctioned with affirmance of lower court's judgment as well as imposition of costs on appeal without notice and hearing.

No prior case can be found on these important constitutional issues. The questions have not been, but should be, settled by this Supreme Court.

5.2 The Decisions of the State Courts are Erroneous

The dismissal by the Court of Appeal of the one and only appeal petitioners had as of right was very erroneous when they were diligently trying to perfect the appeal complying with all applicable rules and court orders, and were no way in fault. In fact, the trial court clerk has completed all record according to petitioners' re-designation of record. Respondents' claim that petitioners failed to comply with the court order was absolutely groundless.

Furthermore, involuntary dismissal of an appeal was a decision on merits and thus dismissal by a single judge without two concurrent judges and without a written opinion was erroneous.

Therefore, the decisions of the state court were very wrong indeed.

This Court should grant this petition to correct these errors of the state courts.

6. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

March 9, 1998

Koichi Matsumoto and
Yuki Kobayashi
Petitioners In Pro Per

Court of Appeal-Second Dist.
Filed Sep 16, 1997, Joseph A. Lane, Clerk

In the Court of Appeal of the State of California
Second Appellate District, Division 1

Koichi Matsumoto, et al., plaintiffs/appellants,	) No.B107490) (SC No.B073320)
v.	) Order of state) court of appeal
James R. Gotcher, et al., defendants/respondents.	) dismissing appeal)

AMENDED ORDER

THE COURT:

Respondents' motion to dismiss is granted. The appeal filed October 4, 1996, only is dismissed.

SPENCER, P.J.

* * * * *

Supreme Court Filed Dec 10, 1997
Robert Wandruff, Clerk
Second Appellate District, Division 1, No.B107490

S065335
IN THE SUPREME COURT OF CALIFORNIA

Koichi Matsumoto,
Appellant
v.
James R. Gotcher,
Respondent

Appellant's petition for review DENIED.

GEORGE
Chief Justice

* * * * *

Court of Appeal-Second Dist.
Filed Dec 18, 1997, Joseph A. Lane, Clerk

In the Court of Appeal of the State of California
Second Appellate District, Division 1

Koichi Matsumoto, et al., plaintiffs/appellants,	) No.B107490 and) B109625
v.	) (SC No.B073320)) Order of state
James R. Gotcher, et al., defendants/respondents.	) court of appeal) dismissing appeal

We have read and considered appellants' motions, filed October 14, 1997, and December 2, 1997. The motions are denied.

We have read and considered respondents' motion to dismiss appeal no.B107490 and appeal no.B109625; the joinders thereto; and appellants' opposition.

Appeal no.B107490, filed November 12, 1996, and no.B109625, filed January 27, 1997, are hereby dismissed.

SPENCER, P.J. ORTEGA, J.

* * * * *

Court of Appeal of the State of California
For the Second Appellate District, Division 1

Yuki Kobayashi
1469 S.Norton Avenue
Los Angeles, CA90019

RE:Matsumoto, Koichi
vs.
Gotcher, James R.
2 Civil B107490
Los Angeles NO. BC073320
Judge:

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 09/10/97 is now final.

* * Dismissal By Motion. * *

Respondent to Recover Costs.

JAN 13 1998 Joseph A. Lane, Clerk
By: S. Beaux, Deputy Clerk

* * * * *